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No. 2703

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

J. L. ALVERSON,

Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant in Error.

OPENING BRIEF FOR PLAINTIFF IN ERROR.

Upon Writ of Error to the District Court of the United States, Eastern District of Washington, Northern Division.

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STATEMENT.

This action was instituted by plaintiff in error, Alverson, for the recovery of damages, in the form of lost profits, resulting from a breach by defendant in error, Oregon-Washington Railroad & Navigation Company, hereafter referred to as the railroad, of a contract for the performance by Alver-

son of certain railroad construction work. Other parties originally named as defendants were subsequently dismissed, leaving the railroad as the sole defendant.

We shall state such portions only of the issues and facts as seem to us pertinent and material to an intelligent understanding of the questions presented by the assignments of error.

Alverson and one L. L. Koeper, as co-partners under the name of Alverson and Koeper, had a subcontract, dated May 11, 1911, for the performance of the work in question (Exhibit "A" attached to the Complaint, Record 7). Thereafter Alverson succeeded to all the rights of the partnership of Alverson & Koeper, and the right of Alverson, as successor of the aforesaid co-partnership, to proceed with the work as an individual was specifically recognized and affirmed in writing by Caughren, Boynton & Company on February 1st, 1912 (Record 28, 67; Plaintiff's Exhibit "D", attached to the Complaint). Subsequently, in the adjustment of certain differences which had arisen between the railroad and the principal contractors, Caughren, Boynton & Company, it was agreed that unless the railroad should, within thirty days from the date of said agreement, April 1, 1912, elect to have the

work completed by them, said principal contractors should be relieved of their obligation for the performance of said work and the railroad would thereupon assume all the obligations of said principal contractors to parties holding sub-contracts for the performance of said work (Plaintiff's Exhibit "E", attached to the Complaint; Record 29). It is admitted by the amended answer that the railroad did not so elect.

The testimony shows, without dispute, that Alverson frequently expressed to the chief engineer of the railroad his willingness to go ahead under his contract, and that he was just as frequently told by that official that the plans for the work were not completed but that he would be informed in due time and allowed to proceed with the work when the railroad should become ready. (Testimony of Alverson, Record 70, 72; testimony of J. Z. Moore, Record 84.) The testimony is also undisputed that Alverson was financially able to perform his contract, and he further testified that he was willing and anxious to do so (Record 72). Many months later, and without ever having requested Alverson to perform said work or notified him of its readiness to have same done, said work was let by the railroad to other contractors by whom it was completed.

The testimony also shows, that in the course of conversations between Alverson and the chief engineer of the railroad in the winter and spring of 1913, a difference of opinion arose as to the proper construction of Alverson's contract and the arbitration agreement between the railroad and Caughren, Boynton & Company. Alverson contending that under said contract he was entitled to be financed and furnished with sand and gravel by the railroad without charge, while the engineer of the railroad appears to have contended for an opposite construction. (Cross-examination of Alverson, Record 74, *et sec.*) The record shows that these were mere discussions and expressions of opinion, and it is not disputed that the railroad never offered to allow Alverson to do the work under his contract, but, on the other hand, continually put him off when he requested to be permitted to go ahead, until the work was finally let to and completed by other contractors.

Paragraph four of Alverson's contract (Record 9), provides:

> "It is further understood and agreed that if the Contractor, in the opinion of the Engineer (communicated in writing by the Engineer to the Contractor) shall fail or refuse to comply with any of the stipulations contained in this contract to be performed by the Con-

tractor, or shall at any time neglect or refuse to prosecute the work with a sufficient force, to insure the completion of the work within the time specified herein, then the Railroad Company may, at its option, after the expiration of 10 days from the mailing of such notice to the Contractor at his Post Office address, cancel this contract and declare the same void, and a notice in writing mailed to the Contractor at his Post Office address, signed by the Railroad Company, shall be sufficient for that purpose. In the event the contract is cancelled as herein provided, the Contractor shall have no claim whatever against the Railroad Company for damages, and all compensation or percentage unpaid to the Contractor under the provisions of this contract shall be retained by the Railroad Company, together with any material then on the ground belonging to the Contractor, to indemnify it from any loss by reason of the default of the Contractor, and the Railroad Company may, at its option, employ other parties to complete said work or any part thereof, and any loss occasioned by reason of such default to be chargeable against the Contractor, the amount of such loss to be estimated by the Engineer, whose decision shall be final and binding on the parties hereto."

There was no pretense of a compliance by the railroad with the provisions of the contract above quoted, but the work was let to other contractors and had progressed far toward completion before Alverson was even aware that he was not to be allowed to perform the work.

The following instructions given orally by the

trial court to the jury, and excepted to by Alverson, are specified in the assignment of errors herein as grounds for reversal, to-wit:

> "I charge you in this connection that the contract, Exhibit A, under which plaintiff claims in this case, does not require the railroad company to furnish sand without cost to plaintiff, and if you find from the evidence, that the plaintiff imposed that condition upon the defendant, then the plaintiff in effect breached and abandoned the contract, and under such circumstances you should find for the defendant."

> "If you find that the plaintiff imposed and demanded, as a condition for the performance of the work, that the defendant furnish gravel without cost to the plaintiff upon the work to be done under the contract, Exhibit A, then you should find for the defendant."

> "If you find that the plaintiff required and demanded, as a condition for the prosecution and performance of the contract, that the railroad company finance the plaintiff, then I charge you, in making such demand and imposing such condition, if you find the same was made by the plaintiff, the contract became thereby abandoned and breached by the plaintiff, and defendant was excused from the performance of the said contract by it, and your verdict should be for the defendant."

The jury returned a verdict in favor of defendant.

A motion for a new trial was thereafter interposed (Record 58), urging the giving of these in-

structions as grounds for the setting aside of the verdict of the jury, which motion was subsequently denied by the court (Record 62). Judgment in favor of the railroad was subsequently entered on the verdict, for the review of which this writ is prosecuted.

ASSIGNMENTS OF ERROR.

The plaintiff has specified the following errors which he believes to have been committed by the lower court in the course of the trial and in the proceedings leading up to and including the entry of the final judgment:

1. The court erred in giving the following quoted portion of instruction number two, wherein the jury was instructed that should it find from the evidence that the plaintiff demanded that the defendant furnish sand without cost to plaintiff, that then the plaintiff in effect breached and abandoned his contract and that the verdict should be for the defendant; said instruction reading as follows:

> "I charge you in this connection that the contract, Exhibit A, under which plaintiff claims in this case, does not require the railroad company to furnish sand without cost to plaintiff, and if you find from the evidence, that the plaintiff imposed that condition upon

> the defendant, then the plaintiff in effect breached and abandoned the contract, and under such circumstances you should find for the defendant."

2. The court erred in giving the following quoted portion of instruction number two, wherein the jury was instructed that should it find from the evidence that the plaintiff imposed and demanded as a condition for the performance of the work, that the defendant furnish gravel without cost to plaintiff, then the verdict should be for the defendant; said instruction reading as follows:

> "If you find that the plaintiff imposed and demanded, as a condition for the performance of the work, that the defendant furnish gravel without cost to the plaintiff upon the work to be done under the contract, Exhibit A, then you should find for the defendant."

3. The court erred in giving the following quoted portion of instruction number two, wherein the jury was instructed that should it find from the evidence that plaintiff required and demanded, as a condition for the prosecution and performance of its contract, that the railroad company finance the plaintiff, the plaintiff, by making such demand and imposing such condition, abandoned and breached his contract and that thereby excusing defendant from the performance of its contract,

then the verdict should be for the defendant; said instruction reading as follows:

> "If you find that the plaintiff required and demanded as a condition for the prosecution and performance of the contract that the railroad company finance the plaintiff, then I charge you, in making such demand and imposing such condition, if you find the same was made by the plaintiff, the contract became thereby abandoned and breached by the plaintiff, and defendant was excused from the performance of the said contract by it, and your verdict should be for the defendant."

4. The court erred in assenting to and thereby in effect giving to the jury the following instruction requested by counsel for the defendant, to-wit:

> "I would ask Your Honor to instruct the jury that in the event they find that the plaintiff exacted the requirement for the furnishings of sand and gravel without cost to the plaintiff, or that he exacted the condition of financing, as instructed by Your Honor, then in either of said contingencies, they are not required to find upon the special findings which Your Honor has submitted."

5. The court erred in allowing the verdict rendered by the jury to stand.

6. The court erred in denying plaintiff's motion for a new trial.

7. The court erred in entering final judgment on the verdict in favor of defendant and against the plaintiff, and awarding costs to the defendant.

ARGUMENT.

From the above instructions it will be observed that the trial court was of the opinion that the demand by one party to an executory contract, before the time had arrived for and before he had been given an opportunity to perform, for more than he was in fact entitled to under the contract, would of itself constitute a repudiation. This view is not supported either by reason or authority and the courts of this country, wherever the question has been presented, have held that such a demand, where the party has not incapacitated himself from performing, does not constitute a breach nor authorize the other party in treating the contract as ended. In order to constitute a repudiation there must be a positive and absolute disavowal of the contract and an expressed determination not to be bound by its provisions.

The courts, on the other hand, have universally held that mere talk by one of the parties before the arrival of the time for performance, though it amount to a demand for more than the contract allows, does not amount to a breach, and this is the utmost that can be charged against Alverson in the case at bar.

Page on Contracts, Sec. 1439, P. 2237, states:

> "If one party to the contract claims as contract rights thereunder more than he is given by the contract, such claim does not of itself amount to a renunciation of the contract. Thus the principal's claiming that the agent under a contract for buying cotton should furnish the principal with an invoice and further description of the cotton, as well as the samples stipulated for in the contract, is not renunciation. Thus if one party claims by virtue of the contract a right to forfeit it under existing conditions, his ineffectual attempt to declare such forfeiture is not a renunciation. If he does not refuse performance at the proper time the adversary party cannot treat the contract as avoided."

In 6 Ruling Case Law, 930, the general rule is stated as follows:

> "It is the party's conduct evincing an intent to be no longer bound by the contract that is equivalent to consent to a rescission. Refusal to fulfil a contract must be absolute to be a tantamount to an assent to its dissolution, and to authorize the other party to rescind it; such refusal must be in no way qualified, and should substantially amount to an avowed determination of the party not to abide by the contract."

Mechem on Sales, Vol. 2, Sec. 1087, expresses the rule thus:

> "Where before the time arrives for the performance of the contract by one party, the other absolutely and unqualifiedly announces

> that he will neither receive such performance by the former nor perform on his part, the former may, if he desires, consider himself as absolved from his duty to perform. This renunciation by the other, however, must be more than mere idle talk of not performing; it must be a distinct, unequivacol and absolute refusal to receive performance or to perform on his own part."

In Lawson on Contracts, Sec. 440, P. 479, discussing the question of what is sufficient to constitute an anticipatory breach before the arrival of the time for performance, it is said:

> "A mere expression of intention not to perform is not a breach; it requires a distinct and unequivocal absolute refusal to perform the promise, which must be treated and acted upon as such by the party to whom the promise was made."

We wish here to emphasize and ask the court to bear constantly in mind that Alverson did not even express an intention not to perform his undertaking, but on the other hand, constantly sought an opportunity to do so, and the utmost that can be said is that in advance of an opportunity for performance, he expressed an opinion in conversation with the railroad engineer and superintendent of construction concerning his rights and obligations under said contract at variance with the views of that official.

The rule here contended for has received the emphatic approval of the United States Supreme Court. The question was presented and squarely decided in the case of Colby vs. Reed, 99 U. S., 560, where it is said:

> "Neither the answer nor the evidence shows that the defendant ever did perform the agreement to deliver, but what he alleged and attempted to prove was that the plaintiff claimed $13,000 of stock more than he, the defendant, contracted to deliver; and his theory is that the demand being in excess of the obligation created by the contract, was null and of no effect, and inasmuch as the demand exceeded the right, he was not required to perform what the contract required."
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> * * * * * * * *
>
> "Responsive to the second request, the Judge told the jury that where a party demands more than he is entitled to receive, that circumstance alone will not justify the other party in refusing to deliver that part of the property to which the party making the demand is entitled, provided it is distinct, well known and clearly distinguishable from that to which the demanding party had no right; that if the plaintiff demanded $45,000 of the stock when he was only entitled to $32,000 of the same, the defendant could not properly refuse to deliver what the plaintiff was entitled to receive, on the ground that the demand was excessive. Injustice and inconvenience would flow from any different rule, and inasmuch as we are all of the opinion that the instruction was correct, it is not deemed necessary to pursue the subject."

In the cases of U. S. vs. Smoot, 82 U. S. 36, and Dingley vs. Oler, 117 U. S. 490, the Supreme Court, going much further than is required by the circumstances of this case, held, in accordance with the general rule in this country, that a mere assertion of unwillingness or inability to perform a contract, before the time for performance has arrived, does not constitute a renunciation. In the latter case, affirming the doctrine announced in the former, the court said:

> "In Smoot's case, 15 Wall. 36, this court quoted with approval the qualifications stated by Benjamin on Sales, 424, that 'a mere assertion that the party will be unable or will refuse to perform his contract is not sufficient. It must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for, if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end.'
>
> We do not find any such refusal to have been given or acted upon in the present case, and the facts are not stronger than those in Avery v. Bowden, 5 El. & Bl. 714, and 6 El. & Bl. 953, which were held not to constitute a breach or renunciation of the contract. The most recent English case on the subject is that of Johnstone v. Milling, in the court of appeal, 16 Q. B. Div. 460, decided in January of the present year, which holds that the words or conduct relied on as a breach of the contract by anticipation must amount to a total refusal

> to perform it, and that that does not, by itself, amount to a breach of the contract unless so acted upon and adopted by the other party.
>
> The present action was prematurely brought before there had been a breach of the contract, even in this sense, by the defendants; for what they said on July 15th amounted merely to a refusal to comply with the particular demand then made for an immediate delivery."

It is obviously unnecessary in this controversy to go to the length to which the Supreme Court went in the Smoot and Dingley cases, since Alverson never at any time expressed a disposition to renounce his contract or refused to be bound by its terms, but simply, in advance of an opportunity for performance, expressed an opinion concerning his rights thereunder in conflict with that of the officials of the railroad. That opinion was, of course, subject to modification, and even though it be conceded to have been wrong, could not in any event have justified the railroad in ignoring the rights of Alverson by letting the work to other parties without offering him an opportunity to perform and without even giving him the notice required by the terms of the contract itself.

That neither an erroneous construction of the terms of a contract by one of the parties thereto nor a demand by such party for more than he is entitled to receive thereunder, constitutes grounds

for rescission by the other party, was distinctly held by the Supreme Court of West Virginia in Armstrong vs. Ross, 55 S. E. 895. Citing the U. S. Supreme Court cases above quoted, the court said:

> "Lastly, a claim to the right of rescission is founded upon the refusal of the appellee to accept performance as offered by the appellant, the interpretation of the latter having been the correct one, and his offer an expression of willingness to perform to the extent of his duty in the premises. Since the refusal was not absolute, the rule invoked does not apply. To work a release, a refusal to perform must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made. Swiger v. Hayman, 56 W. Va. 123, 126, 48 S. E. 839, 107 Am. St. Rep. 889; United States v. Smoot, 15 Wall. (U. S.) 36, 21 L. Ed. 107; Dingley v. Oler, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984. If this were not the law, it would be a dangerous thing to stand upon a controverted construction of a contract. Every man would act at his peril in such cases, and be subjected to the alternative of acquiescing in the interpretation adopted by his opponent, or putting to hazard his entire interest in the contract. The courts have never imposed terms so harsh, or burdens of such weight. It would amount to a virtual denial of the right to insist upon an honest, but erroneous, interpretation."

Though the precise question here presented can not be said to have been directly involved, the Supreme Court of North Dakota in the case of

Stanford vs. McGill, 72 N. W. 938, in holding that an expressed determination to repudiate a contract made in advance of the time for performance does not constitute a breach, took occasion to review both the American and English authorities bearing on the general principles involved in a most thorough and instructive manner. In the course of a lengthy opinion the court said:

> "It is claimed that plaintiff rescinded the contract by selling the 5,000 bushels in Duluth on the 9th of September, two days after the defendants had written plaintiff that they would not fulfill their agreement. * * * Although the English courts have, in our judgment, departed from sound principles, in holding that mere talk is a breach of a contract, despite the fact that the time for performance thereof has not arrived, yet they have not violated justice as well as legal principles by putting it in the power of the party to an agreement, who does not wish to fulfill it, to force a breach upon the other party before the day for performance has arrived, and thus escape the perhaps more serious consequences which might flow from a breach at the time of performance, by selecting such a season for a premature breach thereof as would make the damages comparatively light. * * * We are confident in the soundness of our view that the English doctrine, that a refusal to perform a contract before the period of performance by either party has arrived constitutes a breach thereof, is violative of legal principles, and leads to most incongruous results."

In the case of Emack vs. Hughes, 52 At. 1061, in a suit arising *ex contractu* the contention was advanced that the contract had been breached by plaintiff through the making of excessive demands, not justified by the terms of the contract in question. The court, in rejecting this contention, said:

> "Even an excessive demand would not excuse from a proper performance. Colby v. Reed, 99 U. S. 560, 564, 25 L. Ed. 486. August 22d the defendant notified the plaintiff that the contract was at an end, because the plaintiff had not put up his notes on the 15th. The plaintig's answer was that the defendant was in no position to complain, having failed to ship slate to cover the notes already up. The court told the jury that it was not what the parties had demanded of each other in their letters that was to determine who broke the contract, but which one first failed to do what he was bound to do."

In the case of Ga Nun vs. Palmer, 96 N. E. 99, 101, the New York court of appeals took occasion to say:

> "Where the contract is wholly executory, there must be some express and absolute refusal to perform, or some voluntary act on the part of the individual which renders it impossible for him to perform, in order to constitute an anticipatory breach for which an action will lie; whereas, by a partially executed contract, the breach may result from a failure to perform some of the provisions of the contract."

So in Lundahl vs. Hansen, 35 N. E. 741, the Supreme Court of Illinois announced the rule as follows:

> "The mere fact that one of the parties may have understood his rights under the contract to be different from what they in fact were, and attempted to declare a forfeiture of it, when he had no legal right to do so, would not, as we understand the law, necessarily entitle the other party to treat the contract as rescinded. * * * The weakness of appellant's case lies in the fact that he seeks to rescind and cancel a contract fairly entered into, because of an attempt by the other contracting party to do a thing which he had no right to do, but which was wholly harmless to him."

So in the case of Bell vs. Maximos, 19 S. W. 1070, 1072, the Supreme Court of Texas, holding that a demand by one party to a contract for more than he was entitled to received thereunder, does not constitute a breach thereof nor justify the other party in considering the contract as ended, used the following language:

> "At least a failure to classify until such information was furnished would not be a repudiation of the contract until the defendants should give notice that it would not be furnished, which was never done. * * * Of course, it was not the duty of the defendants to send the invoice of the cotton unless the contract bound them to do so; but the solution of that question in their favor, should we

> do so, would not be decisive of the respective rights of the parties upon this appeal. They may not have been required, by the terms of the agreement, to forward invoices in addition to the 'tags and samples'; and yet the facts that the plaintiff requested the invoices, and delayed attempting to classify the cotton until they could be obtained, does not, as we think, in connection with the other circumstances of the case, show that he intended to repudiate, or had repudiated, the contract, but quite the contrary."

Many additional authorities might be cited to the same effect, but the foregoing are sufficient, we believe, to illustrate and convince the court of the correctness of our contention.

As heretofore pointed out, paragraph IV of Alverson's contract required the railroad company to give Alverson 10 days' notice in writing of any alleged default on his part as a condition precedent to the exercise by the railroad of its election to declare said contract void, because of a breach on the part of Alverson. The provision being as follows:

> "It is further understood and agreed that if the Contractor, in the opinion of the Engineer (communicated in writing by the Engineer to the Contractor) shall fail or refuse to comply with any of the stipulations contained in this contract to be performed by the Contractor, or shall at any time neglect or refuse to prosecute the work with a sufficient

force, to insure the completion of the work within the time specified herein, then the Railroad Company, at its option, after the expiration of 10 days from the mailing of such notice to the Contractor at his Post Office address, cancel this contract and declare the same void, and a notice in writing mailed to the Contractor at his Post Office address, signed by the Railroad Company, shall be sufficient for that purpose. In the event the contract is cancelled as herein provided, the Contractor shall have no claim whatever against the Railroad Company for damages, and all compensation or percentage unpaid to the Contractor under the provisions of this contract shall be retained by the Railroad Company, together with any material then on the ground belonging to the Contractor, to indemnify it from any loss by reason of the default of the Contractor, and the Railroad Company may, at its option, employ other parties to complete said work or any part thereof, and any loss occasioned by reason of such default to be chargeable against the Contractor, the amount of such loss to be estimated by the Engineer, whose decision shall be final and binding on the parties hereto."

A full compliance by the railroad with the requirements of the above quoted provision of the contract was necessary as a condition precedent to a rescission by the railroad, even had Alverson given sufficient cause for a declaration of forfeiture. The railroad, however, did not give the required notice nor pretend to, in any sense, comply with the requirements imposed upon it by said un-

dertaking, and its failure in that regard shows that its officers fully understood that no sufficient grounds for forfeiture existed and that the letting of the work to other contractors was done with full knowledge and in deliberate and willful violation of the rights of Alverson.

The record shows that Alverson's motion for a new trial squarely presented to the trial court the incorrectness of the instructions to which objection is here made, and we respectfully contend that the lower court committed further and cumulative error in refusing a new trial and in entering judgment for defendant.

The judgment below should be reversed and a new trial granted.

Respectfully submitted,

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O. C. MOORE,
Attorneys for Plaintiff in Error.